BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DAN L. BLEVINS	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 234,668 & 236,809
FIREBAUGH CONSTRUCTION, INC.	)	
Respondent	)	
AND	)	
	)	
BUILDERS' ASSOC. SELF-INSURERS' FUND	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the June 5, 2000 Award entered by Administrative Law Judge Brad E. Avery. The Appeals Board heard oral argument on November 8, 2000.

APPEARANCES

John J. Bryan of Topeka, Kansas, appeared on behalf of claimant. Wade A. Dorothy of Lenexa, Kansas, appeared on behalf of respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for two accidents, the first occurred on April 16, 1998, and the second, which was an aggravation of the injuries suffered in the first accident, occurred on August 18, 1998. These resulted in injuries to claimant's upper extremities, shoulders, back and neck. In the Award, Judge Avery found claimant was entitled to a 66.5 percent permanent partial general disability award based upon a 33 percent task loss opinion given by Peter V. Bieri, M.D., and a 100 percent wage loss.[1]

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[1] Instead of treating the second accident as a natural consequence of the first, the parties stipulated to two separate dates of accident. Nevertheless, the ALJ entered one award for both claims. The parties do not dispute that finding and therefore, the Board will likewise keep the two accidents together and treat them as one claim.

After the injury claimant was offered accommodated work with respondent that may have paid a wage comparable to that which he was earning at the time of his injury. However, claimant was unable to attempt those jobs due to a lack of transportation and the loss of his union membership from nonpayment of the dues. Furthermore, claimant argues that all of the jobs respondent had available were outside his restrictions. Respondent counters that it would have accommodated claimant's restrictions so that claimant could have performed the jobs that were offered. Respondent argues that because claimant's refusal to attempt any of the accommodated jobs offered was not in good faith, the comparable wage from those jobs should be imputed to claimant and, therefore, claimant is not entitled to an award based on a work disability. Respondent contends that claimant's permanent partial disability award should be limited to the 10 percent functional impairment rating given by Dr. Bieri.

Conversely, claimant contends that the ALJ's Award should be affirmed in all respects.

The nature and extent of claimant's disability is the only issue for review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire record, the Board makes the following findings of fact and conclusions of law:

The Board finds the Award of the ALJ should be affirmed. The Board agrees with the ALJ's analysis of the evidence as set forth in the Award. In particular, the Board agrees that, in this instance, greater weight should be given to the opinions of Dr. Bieri as to claimant's permanent restrictions, task loss and impairment.

The Board further agrees with the findings of fact and conclusions of law that are set out in the Award. It is not necessary to repeat those findings and conclusions. Therefore, the Appeals Board adopts the ALJ's findings and conclusions as its own as if specifically set forth herein.

Because claimant's injuries constitute an "unscheduled" injury, claimant's permanent partial general disability is determined by the formula set forth in K.S.A. 1997 Supp. 44-510e.[2] That statute provides:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of

[2] *See* Pruter v. Larned State Hospital, ___ Kan. ___, 26 P.3d 666 (2001); Depew v. NCR Eng'g & Mfg., 263 Kan. 15, 947 P.2d 1 (1997).

> permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of Foulk[3] and Copeland.[4] In Foulk, the Court held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In Copeland, for purposes of the wage loss prong of K.S.A. 44-510e, the Court held that workers' post-injury wages should be based upon ability rather than actual wages when they fail to make a good faith effort to find appropriate employment after recovering from their injuries.

> If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[5]

The question becomes whether claimant acted in good faith when he failed to attempt the accommodated job with respondent following his release to work after the injury. If claimant failed to make a good faith effort, or unreasonably refused to perform appropriate work as in Foulk, then claimant is precluded from receiving an award based on a work disability.[6] It should be remembered, however, that in Foulk, there was a serious question about the claimant's credibility. Foulk's testimony that she could not perform the accommodated job was contradicted by a videotape showing her performing activities she had testified she was unable to do. Her credibility was, likewise, important to the question of the appropriateness of her restrictions, because the physician acknowledged they were based primarily on claimant's subjective complaints. Here, unlike in Foulk, the Board finds claimant to be credible. The test remains one of good faith, however, on the part of both claimant and respondent.[7]

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[3] Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[4] Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[5] Copeland at 320.

[6] *See* Swickard v. Meadowbrook Manor, 26 Kan. App. 2d 144, 979 P.2d 1256 (1999); Ramirez v. Excel Corporation, 26 Kan. App. 2d 139, 979 P.2d 1261, *rev. denied* ___ Kan. ___ (1999).

[7] *See* Helmstetter v. Midwest Grain Products, Inc., ___ Kan. App.2d ___, 18 P.3d 987 (2001), and Oliver v. The Boeing Company-Wichita, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 886 (1999); Tharp v. Eaton Corp., 23 Kan. App. 2d 895, 940 P.2d 66 (1997).

Following claimant's second injury, respondent made somewhat belated offers to return claimant to work in an accommodated position. Claimant, believing that no full time light duty work was available, did not believe respondent's offers of accommodated work were made in good faith. For this reason claimant did not think he could perform any of the jobs respondent offered because of his injuries. In addition, claimant contends that the jobs respondent offered were not in good faith because they were too far from his residence. Although claimant disputes the reasonableness of the accommodations, the record fails to establish that respondent acted unreasonably or in bad faith in making the offers of accommodated work.[8] At the time, there were simply no closer jobs available for respondent to offer claimant. Likewise, the Board finds that claimant's refusal to perform the accommodated work with respondent was done in good faith.

A claimant may make a good faith effort and still be unable to perform accommodated work.[9] A claimant may, for example, be assigned work which does not exceed medical restrictions but which is beyond the claimant's ability or causes his symptoms to worsen. In spite of good faith efforts, a claimant may not perform the job adequately. In the present case, respondent never specifically explained how it would accommodate Dr. Bieri's restrictions. And, claimant made known his concerns and reasons for refusing to even attempt the work. The Board cannot conclude claimant did not exercise reasonable judgment or did not act in good faith in refusing to return to the offered accommodated work.

One of the reasons claimant gave for refusing the respondent's offer of accommodated employment was a lack of transportation. The Kansas Court of Appeals' decision in Ford indicates that the effect to be given a claimant's refusal to attempt accommodated employment due to a lack of transportation because of financial constraints resulting from a period of unemployment caused by an injury should be based on a good faith/bad faith analysis and will not automatically result in a denial of work disability.[10] When claimant was working for respondent his job site was closer to his residence and he had been able to get a ride to work. But when respondent made the offer of accommodated work, there were no jobs available close to where claimant lived. Also, claimant's transportation and union membership problems, in part, predated his injury. The injury may have contributed, but those problems cannot be ascribed totally to a financial hardship caused by claimant's injuries and subsequent loss of employment.

Nevertheless, the Board finds no fault with either party and no bad faith either in claimant's inability to attempt the accommodated work with respondent or with the delay in respondent's offer of an accommodated job. Claimant had no transportation to get from his residence west of Topeka to the work sites in suburban Kansas City. Furthermore, claimant

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[8] *See* Ford v. Landoll Corporation, 28 Kan. App. 2d 1, 11 P.3d 59, *rev. denied* ___ Kan. ___ (2000), and Niesz v. Bill's Dollar Stores, 26 Kan. App.2d 737, 993 P.2d 1246 (1999).

[9] *See* Guererro v. Dold Foods, Inc., 22 Kan. App. 2d 53, 913 P.2d 612 (1995).

[10] Ford, supra.

was no longer a union member and this was a requirement for employment with respondent. Respondent, on the other hand, had no closer jobs to offer claimant and they were bound by the terms of their union contract to only hire workers who were union members. It was not made clear, however, how the union contract might impact respondent's ability to permanently accommodate claimant's restrictions.

As to claimant's subsequent job search efforts, the Board finds claimant acted in good faith and specifically finds claimant acted in good faith when rejecting jobs that he believed he could not do and/or violated his restrictions.[11] Accordingly, claimant should not be limited to a permanent partial disability award based upon his impairment of function. Claimant is entitled to a work disability award.

As required by K.S.A. 44-510e(a), the ALJ gave equal weight to the 33 percent task loss opinion given by Dr. Bieri and the claimant's 100 percent actual wage loss and found claimant has a 66.5 percent permanent partial disability.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Brad E. Avery, dated June 5, 2000, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of October 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John J. Bryan, Attorney for Claimant
Wade A. Dorothy, Attorney for Respondent and Insurance Carrier
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Workers Compensation Director

[11] *See* Edwards v. Klein Tools, Inc., 25 Kan. App. 2d 879, 974 P.2d 609 (1999); and Bohanan v. U.S.D. No. 260, 24 Kan. App. 2d 362, 947 P.2d 440 (1997).